of this nature is properly allowable as an operating expense of the business. Where, as in the present case, the trader elects to close out his short sales and take a profit, this is, in my opinion, properly classified as profit from carrying on the trade. Mr. Hayden contended that this was simply a speculation in raw sugar resulting in a capital profit such as might have resulted from a speculation in shares or some other commodity but, upon the evidence in this case, that position cannot, in my opinion, be supported."

And as noted by Kerwin J. in the same case at page 603.

"In no sense may it be said that the operations were unconnected with the appellant's business and it is at least an added circumstance that speculation was made in raw sugar. Even if it were the only transaction of that character it should be held in the light of the evidence that it was part of the appellant's business or calling."

The Special Commissioners therefore rejected Revenue's argument that to amount to genuine hedging the terminal transactions should equal the physical requirements or that the period of hedging should coincide with the period of delivery of the raw sugar.

The Special Commissioners felt that "it is common sense and hardly illogical in our view, that in order to manufacture refined sugar the (Taxpayer) had to purchase raw sugar. The price of raw sugar is subject to violent fluctuations in the world market and there was no way for the (Taxpayer) or any other refined sugar manufacturer to insure itself and protect its costs of raw sugar except to hedge on the terminal market."

With respect, I agree that on the facts as found by them, for which there was sufficient evidence, the Special Commissioners were for the reasons given by them amply justified in arriving at the conclusion that the terminal transactions entered into by the Taxpayer in this instance were not merely speculation but hedging operations.

Alternative argument: a separate business?

There is an alternative argument by Revenue that the hedging operations were not covered by the pioneer certificate. By this certificate, the Taxpayer was deemed to be a pioneer company/factory for the production of refined sugar. To produce this product, it needed the raw sugar. The primary source would be the purchase of the raw sugar and the one recognised method of stabilising the price of the required sugar is to hedge on the terminal markets. Hedging is therefore, to borrow the words used by Pollock B. in another context, in *Reids Brewery Co. Ltd.* v. *Male*[4] "an adjunct, ancillary to and a very advantageous adjunct to" the business of sugar refinery. Hedging does not in the context of this case become a separate business.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

NG GOH WENG & ORS. v. PUBLIC PROSECUTOR

[R.Cr.J. (Gunn Chit Tuan J.) December 16 and 28, 1977]
[Penang — Criminal Revision No. 11 of 1977]

Criminal Law and Procedure — Criminal revision — Production of statement made by accused at preliminary inquiry — Admissibility of — "Inquiry" distinguished from "trial" — Scope of s. 113(1), C.P.C. — Criminal Procedure Code, ss. 2, 113(1), 139 & 422 — Evidence Act, 1950, ss. 5, 26 & 136 — Courts of Judicature Act, 1964, s. 35(1).

The three accused were charged provisionally for having committed an offence punishable under section 302 read with section 34 of the Penal Code. A preliminary inquiry was held in the course of which the prosecution produced a statement alleged to have been made by third accused. The Inquiry Magistrate allowed the statement to be received in evidence notwithstanding objection by counsel for the third accused. Counsel for the three accused applied under section 35(1), Courts of Judicature Act, 1964 for the court's revision in this matter.

The court was faced with the question of whether the cautioned statement is admissible at a preliminary inquiry.

Held: (1) as the provisions of the amended section 113(1), Criminal Procedure Code do not apply to preliminary inquiries, a Magistrate at a preliminary inquiry is still bound by the provisions of the Evidence Act.

(2) section 26 of the Evidence Act is applicable in this case. In the absence of any express provision, a statement which amounts to a confession made by any person whilst he is in the custody of a police officer is not admissible unless it was made in the immediate presence of a President of a Sessions Court or Magistrate;

(3) the statement should not have been taken as evidence and the learned Magistrate should expunge it from the record and thereafter proceed to complete the preliminary inquiry.

Cases referred to:-

(1) *Re Low Kuan Meng* [1962] M.L.J. 265.

(2) *Govindasamy* v. *Public Prosecutor* [1949] M.L.J. 101.

(3) *R.* v. *Tay Choon Huat* [1947] M.L.J. xxiii.

CRIMINAL REVISION.

S.P. Annamalai for the 1st applicant/accused.

R. Rajasingam for the 2nd applicant/accused.

Subash Chandran for the 3rd applicant/accused.

Abdul Kadir bin Musa (Deputy Public Prosecutor) for the respondent.

Gunn Chit Tuan J.: The three abovenamed persons were charged provisionally as follows:—

"That you jointly with two persons still at large, between the 7th day April 1977 and the 13th day of April 1977, at the Prai Estate (off Jalan Dato Hussein Onn) in the District of Butterworth, in the State of Penang, in furtherance of the common intention of you all did commit murder by causing the death of one Tang Hung Giap, who at the time of his death is believed to be the subject of an offence under section 3(1) of the Kidnapping Act No: 41 of 1961, and that you have thereby committed an offence punishable under section 302 of the Penal Code, read together with section 34 of the same Code."

A preliminary inquiry was directed to be held before the learned Senior President of the Sessions Court, George Town, Penang, sitting as a Magistrate, and he proceeded to hold a preliminary inquiry on November 28, 1977, under Chapter XVII of the Criminal Procedure Code (F.M.S. Cap. 6). In the course of the inquiry, the prosecution produced a statement which was alleged to have been made by the third accused to a Police Inspector and which was record-

ed by the latter in writing. Counsel for the third accused objected to the production of the said statement on the grounds that there was no provision in law under which such statement could be produced and received as evidence at a preliminary inquiry. The Inquiry Magistrate after hearing arguments ruled on December 14, 1977, that the said statement could be received in evidence and it was marked as Exhibit P53. Counsel for the three accused thereupon at that stage applied to me under section 35(1) of the Courts of Judicature Act, 1964, (Revised-1972) to exercise the High Court's general supervisory and revisionary jurisdiction in this matter. I therefore called for the record of proceedings in the subordinate court and on December 16, 1977, proceeded to hear counsel for all three accused as well as the learned Deputy Public Prosecutor who was appearing for the prosecution at the preliminary inquiry.

Mr. Subash Chandran, counsel for the third accused, referred to the newly amended section 113(1) of the Criminal Procedure Code, which reads as follows:—

"113. (1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that —

(a) no such statement shall be admissible or used as aforesaid —

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible."

He pointed out that the above sub-section (1) of section 113 of the Criminal Procedure Code referred only to a *trial* of any person and submitted that the said section therefore did not apply to enable such statements to be admitted in evidence at a preliminary inquiry. He agreed that section 139 of the Criminal Procedure Code applied when the learned Deputy Public Prosecutor sought to produce the said statement, but argued that any evidence produced in support of the prosecution's case could only be received subject to sections 5 and 136 of the Evidence Act, 1950 (Revised-1971) because section 2 of the said Act has clearly stated that the Evidence Act shall apply to all judicial proceedings, including preliminary inquiries. He further argued that section 26 of the Evidence Act applies in this case unless it can be shown that there is some other express provision contained in any written law which permits such a statement recorded by a police officer, and not by a President of the Sessions Court or Magistrate, to be admissible as evidence.

Mr. Rajasingam, counsel for the second accused, also pointed out that the present section 113(1) of the Criminal Procedure Code clearly referred to *trials* only and does not override the provisions of section 139 of the Criminal Procedure Code in allowing an inquiry Magistrate to take all evidence as may be produced in support of the prosecution's case, whether such evidence is admissible or not. He also contended that it could not be argued that it was an omission on the part of the Legislature to have left out the word "inquiry" in the new section 113(1) of the Criminal Procedure Code. He referred to section 115(1) of the Criminal Procedure Code and pointed out that in that section the Legislature had deliberately used the words "inquiry or trial", thereby intending that the said section 115 was applicable to both inquiries and trials. He also stated that the learned deputy had conceded that an inquiry is not a trial. All three counsel also argued that section 422 of the Criminal Procedure Code did not apply and the court was only concerned with the question of whether the cautioned statement is admissible at a preliminary inquiry.

Mr. Annamalai, counsel for the first accused, referred to section 2 of the Criminal Procedure Code and pointed out that, apart from the fact that the prosecution had conceded that an inquiry is not a trial that section had defined "judicial proceeding" to mean "any proceeding in the course of which evidence is or may be legally taken". Although the definition of an inquiry in our Criminal Procedure Code does not exclude a trial, our courts have held that a preliminary inquiry is not a trial — see *Re Low Kuan Meng*.[1] He also referred to page 590 of *Mallal's* Criminal Procedure Code (4th Ed.) and pointed out that it has been held in the case of *Govindasamy* v. *Public Prosecutor*[2] that an omission to comply with mandatory provisions of the Criminal Procedure Code is not a mere irregularity which can be cured by recourse to section 422 of the said Code. He also supported the arguments of the other two defence counsel that under section 139 of the Criminal Procedure Code a Magistrate hearing an inquiry shall take or permit to be taken only such evidence as he is authorised by law to take or permit to be taken and no other evidence.

I found it difficult to follow the logic of the learned deputy's arguments, but essentially his contention was that subject to his agreement that an inquiry is not a trial, the statement in question recorded by the Police can be taken by the Inquiry Magistrate as evidence under section 139 of the Criminal Procedure Code. I also understood his arguments to be that the Magistrate must take any statement as evidence even if that statement was made as a result of any inducement, threat or promise. However, in all fair-

ness, I think he probably meant that such statement must be taken as evidence by the Inquiry Magistrate if it was produced in support of the prosecution's case at the preliminary inquiry, though the question of the admissibility of the statement in evidence could be left to the trial court at the trial of the accused persons. The learned deputy also referred to section 422 of the Criminal Procedure Code and here again, if I had understood him correctly, he said that the accused persons might not be committed for trial on the tentative charge without the statement in question.

Having considered this matter carefully as well as the arguments of all three learned defence counsel and the learned Deputy Public Prosecutor, I came to the conclusion that the newly amended section 113 of the Criminal Procedure Code only applies to admit statements made by any person charged with any offence to a police officer of or above the rank of Inspector as evidence at his trial only. The hearing and taking of evidence for the prosecution at preliminary inquiries into cases triable by the High Court are provided for in section 139 of the Criminal Procedure Code, which is as follows:—

"139. (i) When the accused person is brought before him the Magistrate shall proceed to hear the case for the prosecution and to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for.

(ii) Nothing in this section shall prevent evidence being produced in support of the prosecution or called for by the Magistrate at any stage of the proceedings provided that an opportunity is given to the accused to cross-examine and to answer and rebut such evidence.

(iii) If the Magistrate calls for other evidence than that produced in the case for the prosecution he must record the fact on the depositions stating shortly the nature of the evidence he has called for.

(iv) If the officer or other person conducting the prosecution applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or other thing the Magistrate shall issue such process unless for reasons to be recorded he deems it unnecessary to do so."

As the provisions of the amended section 113(1) of the Criminal Procedure Code do not apply to preliminary inquiries, I am of the view that when a Magistrate proceeds to hear the case for the prosecution at a preliminary inquiry, he is still bound by the provisions of the Evidence Act, which apply to all judicial proceedings, and he can only take such evidence as may be produced in support of the prosecution's case provided that such evidence is legally admissible under the provisions of the said Evidence Act. In this case, section 26 of the Evidence Act is applicable and in the absence of any express provision, such as section 113(1) of the Criminal Procedure Code, contained in any other written law, a statement which amounts to a confession made by any person whilst he is in the custody of a police officer is not admissible unless it was made in the immediate presence of a President of a Sessions Court or Magistrate.

One other point, which had to be considered, was whether the order of the Inquiry Magistrate in admitting the said statement (Exhibit P53) should be reversed and in doing so I had to consider whether the improper admission of the said statement had occasioned a failure of justice. I had in mind the case of *Rex* v. *Tay Choon Huat*,[3] in which the accused was convicted under section 40 of the Liquors Revenue Ordinance for storing on his licensed premises dutiable liquor. The only point taken on appeal was that the certificate of the Chemist, Singapore, was not admissible in evidence under section 424 of the Singapore Criminal Procedure Code. It was argued that the fault was covered by section 440 of the Singapore Criminal Procedure Code (which is equivalent to section 422 of our Criminal Procedure Code), and that the error in the certificate merely amounted to this, that there was the improper admission of evidence and that this omission had not occasioned a failure of justice. For the appellant it was pointed out that if the certificate had not been admitted in evidence, there was no case at all. Murray-Aynsley C.J. held in an oral judgment that it could not be said that the improper admission of the disputed evidence in this case had not occasioned a failure of justice and the appeal was allowed. In this case, I also had in mind what I understood the learned deputy to have said, namely, that without the statement in question, the accused persons might not be committed for trial on the tentative charge. In my view, therefore, it would occasion a failure of justice if the accused persons were committed and had to go through the agony of standing trial in the High Court on the tentative charge of murder merely because of the improper admission of a statement made to a police officer which cannot be taken as evidence at a preliminary inquiry. However, it is for the Magistrate himself in this case to consider all other legally admissible evidence taken by him in the preliminary inquiry and then to decide under the provisions of sections 140, 141, 142 and 143 of the Criminal Procedure Code whether to discharge or commit the accused persons for trial on the tentative charge or on any other charge or charges. In the circumstances of this case and for the reasons stated above, I therefore ruled that the said statement marked Exhibit P53 should not have been taken as evidence and directed the Inquiry Magistrate to expunge it from the record of the proceedings before him and thereafter to proceed to complete the preliminary inquiry.

Order accordingly.

Solicitors: *Karpal Singh & Co.; R. Rajasingam & Co.; Jag-Jit Singh & Co.*

TELOK SABANG (1967) BHD. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Yusoff J.) March 31, 1978]

[Kuching — Civil Suit No. K. 63 of 1971]

Government Proceedings — Emergency — Tort — Armed Forces — Negligence caused by fire — Emergency (Essential Powers) Ordinance 1969, s. 5 — Government Proceedings Ordinance, 1956, s. 6(2).

Tort — Negligence — Fire — Emergency — Armed forces in occupation of sawmill — Fire occurred after 31 hours after army had left — Whether armed forces responsible — Emergency (Essential Powers) Ordinance, 1959, s. 5 — Government Proceedings Ordinance, 1956, s. 6(2).

This suit arose from the occupation by the armed forces of the plaintiff's sawmill in 1971. The plaintiff claimed damages in consequence of a fire destroying the said sawmill. It was not disputed that because of the security situation in the area one platoon from the Royal Military Forces occupied